



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

**APR 23 2012**

OFFICE OF  
CIVIL RIGHTS

**Return Receipt Requested**

Certified Mail# 7004-2510-0004-2241-6879

**In Reply Refer to:**

EPA File No. 13R-04-R9

Jack Broadbent  
Executive Officer  
Bay Area Air Quality Management District  
939 Ellis Street  
San Francisco, CA 94109-7714

**Re: DISMISSAL OF TITLE VI ADMINISTRATIVE COMPLAINT**

Dear Mr. Broadbent:

The purpose of this letter is to notify the Bay Area Air Quality Management District (BAAQMD or the District) that the U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR) is dismissing the claims in the administrative complaint filed with OCR pursuant to EPA's regulations implementing Title VI of the Civil Rights Act of 1964, as amended,<sup>1</sup> (Title VI) by the Californians for Renewable Energy (CARE) against BAAQMD (Complaint Number 13R-04-R9).

CARE alleged that BAAQMD's failure to provide public participation opportunities with regard to a settlement agreement resulted in a less stringent penalty being assessed against the Calpine Pittsburg power plant. This less stringent penalty allegedly created a disparate impact on the nearby community, in the form of illnesses known to be related to exposure to industrial pollution.<sup>2</sup> CARE also alleged that BAAQMD's failure to release compliance documents prior to the re-issuance of a permit violated Title VI and created an adverse impact on CARE members because CARE was unable to hold Calpine environmentally accountable. CARE members were allegedly disparately impacted in the form of illnesses known to be related to exposure to industrial pollution.<sup>3</sup> For the following reasons OCR is dismissing the complaint.

---

<sup>1</sup> 42 U.S.C. §§ 2000d *et seq.*

<sup>2</sup> Email from Robert Sarvey, CARE to Helena Wooden-Aguilar, Acting Assistant Director regarding response to a Request for Information for 13R-04-R9. (February 11, 2010); Letter from Karen D. Higginbotham, Director, Office of Civil Rights, EPA to Complainant regarding the acceptance of administrative complaint file no. 13R-04-R9 (July 11, 2007).

<sup>3</sup> *Id.*

## II. METHODOLOGY

EPA conducted its investigation in accordance with the U.S. Department of Justice (DOJ) Investigation Procedures Manual.<sup>4</sup> Specifically, OCR received responses from two information requests submitted to the recipient, and one information request submitted to the complainant, and collected additional information from EPA websites.<sup>5</sup> OCR conducted a telephone interview with Mr. Michael Boyd, President of CARE, Mr. Bob Sarvey, CARE, and Mr. Martin Homec, an attorney representing CARE, on September 4, 2008.<sup>6</sup> On September 5, 2008, OCR conducted a telephone interview with Mr. Alexander Crockett, Assistant General Counsel of BAAQMD.<sup>7</sup> Finally, on March 26, 2009, OCR conducted a telephone interview with Adrienne Bloch, Senior Attorney with the Communities for a Better Environment (CBE).<sup>8</sup>

EPA's investigative record includes: the complaint; written responses submitted by BAAQMD and CARE; transcripts of interviews of CARE, BAAQMD, and CBE; official letters and e-mails; and other materials obtained from public sources of information.

## III. FACTUAL BACKGROUND

### A. Recipient

According to its website, BAAQMD is committed to achieving clean air in order to protect the public's health and the environment in the San Francisco Bay region.<sup>9</sup> BAAQMD "aims to attain and maintain air quality standards, increase public awareness of positive air quality choices, and develop and implement protocol and policies for Environmental Justice".<sup>10</sup> BAAQMD -- the state's first regional agency dealing with air pollution -- was created by the California Legislature in 1955.<sup>11</sup> BAAQMD's

---

<sup>4</sup> See Investigation Procedures Manual for the Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes. (September 1998).

<sup>5</sup> See generally <http://cfpub.epa.gov/compliance/resources/policies/civil/penalty/> and <http://www.epa.gov/compliance/basics/enforcement.html#actions>.

<sup>6</sup> Interview conducted by Helena Wooden-Aguilar, Senior Case Manager with Mr. Michael Boyd, President of CARE, Mr. Bob Sarvey, CARE, and Mr. Martin Homec, Esq. (September 4, 2008)

<sup>7</sup> Interview conducted by Helena Wooden-Aguilar, Senior Case Manager with Mr. Alexander Crockett, Assistant General Counsel, BAAQMD. (September 5, 2008)

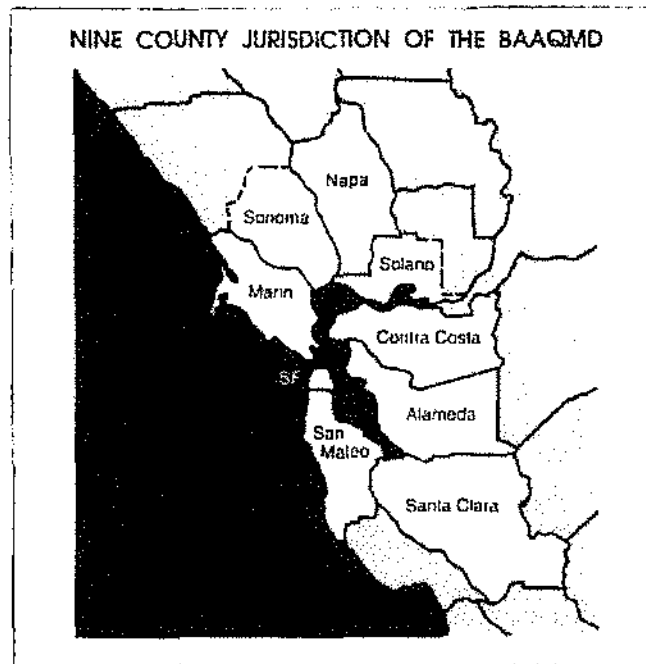
<sup>8</sup> Interview conducted by Helena Wooden-Aguilar, Senior Case Manager with General Counsel for the Communities for a Better Environment. (March 26, 2009)

<sup>9</sup> <http://www.baaqmd.gov/>

<sup>10</sup> <http://www.baaqmd.gov/>

<sup>11</sup> <http://www.baaqmd.gov/dst/jurisdiction.htm>

jurisdiction encompasses the seven counties of Alameda, Contra Costa, Marin, San Francisco, San Mateo, Santa Clara and Napa, and portions of two others - southwestern Solano and southern Sonoma.<sup>12</sup>



See <http://www.baaqmd.gov/dst/jurisdiction.htm>

BAAQMD is governed by a 22-member Board of Directors composed of locally elected officials from each of the nine Bay Area counties. An independent, five-member Hearing Board serves to adjudicate regulatory compliance issues that may arise between BAAQMD and local industries, and also hears appeals of permitting decisions made by the Executive Director.<sup>13</sup>

The BAAQMD Compliance and Enforcement Division (C&E Division) "provides companies with assistance in complying with air quality rules and regulations".<sup>14</sup> The Division has approximately 70 field-based, inspection staff that conducts inspections of air pollution sources, verifies compliance, investigates breakdowns, documents violations, and responds to citizen complaints about air pollution and accidental releases of air contaminants.<sup>15</sup> The inspection staff is assigned geographic areas throughout the

---

<sup>12</sup> *Id.*

<sup>13</sup> <http://www.baaqmd.gov/The-Air-District.aspx>

<sup>14</sup> <http://www.baaqmd.gov/Divisions/Compliance-and-Enforcement.aspx>

<sup>15</sup> *Id.*

nine bay area counties and is responsible for all the permitted sources and inspection activity within that area.<sup>16</sup>

The BAAQMD C&E Division also handles Notices of Violation (NOVs) in concert with the District Counsel's office.<sup>17</sup> A NOV is a formal record of the BAAQMD staff's conclusion that a violation of a state law regarding air quality or a District regulation has occurred.<sup>18</sup> "In most cases, a NOV can be settled by taking corrective action and paying a penalty."<sup>19</sup> NOVs not resolved through the Mutual Settlement Program<sup>20</sup> will be handled by the District Counsel's Office, or Legal Division.<sup>21</sup> NOVs are handled in numerous ways - administratively, criminally, or through civil actions. BAAQMD Counsel's Office determines which route to take based on the facts of each case.<sup>22</sup>

#### B. Complainant

CARE is a non-profit public benefit corporation organized under the laws of California in 1999.<sup>23</sup> CARE is organized exclusively for charitable, scientific and educational purposes. The specific purposes of CARE are:

to supply on a nonprofit basis both nonprofessional and professional legal assistance to planning, conservation groups, small business customers, residential customers, small business and residential renewable energy self suppliers, and neighborhood groups, in regards to new energy projects in the state of California; to engage on a nonprofit basis in research and information dissemination with respect to legal rights in a healthy environment by giving legal advice, appearing before administrative bodies, and enforcing environmental laws through court actions; and to employ legal counsel, technical experts, and associated staffing on a professional or contractual basis to carry out these purposes.<sup>24</sup>

---

<sup>16</sup> *Id.*

<sup>17</sup> <http://www.baaqmd.gov/Divisions/Compliance-and-Enforcement/Compliance-Assistance/Notices-of-Violations.aspx>

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* The Mutual Settlement Program offers the opportunity to settle the violator's case out of court by reaching agreement with the BAAQMD over penalties.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> <http://www.calfree.com/CAREByLaws.doc>

<sup>24</sup> *Id.*

CARE also provides “assistance to low-income communities and communities of color threatened by sky rocketing electricity bills and the expedited siting and construction of gas fired power plants in their communities.”<sup>25</sup>

#### C. The Facility

The Los Medanos Energy Center facility (Facility) is a natural gas-fired power plant presently owned and operated by Calpine Corporation (Calpine).<sup>26</sup> The Facility operates two large natural gas combustion turbines with associated heat recovery steam generators, and one auxiliary boiler.<sup>27</sup>

### IV. COMPLAINT ALLEGATIONS AND RESPONSES

#### A. Allegations in Discrimination Complaint

On December 23, 2004, Mr. Michael Boyd, President of CARE, filed an administrative complaint with OCR. Two allegations concerning BAAQMD were accepted for investigation on July 11, 2007. The first accepted allegation stated: “BAAQMD’s failure to provide public participation opportunities on a settlement agreement, which resolved 66 notices of violation against Calpine Pittsburg Power Plant LLC, (hereinafter “Calpine”) facilities violated Title VI.”<sup>28</sup> The complaint stated that BAAQMD’s policy or practice of not providing an opportunity for public comment on a September 1, 2004, civil penalty settlement agreement caused an adverse disparate impact on the minority residents of Pittsburg, CA. In addition, the complaint alleged that, unlike with the Calpine settlement agreement, BAAQMD provided public participation opportunities regarding a January 7, 2003, settlement executed by BAAQMD, Communities for a Better Environment (CBE) and Our Children’s Earth (OCE).<sup>29</sup>

The second allegation accepted stated that “BAAQMD’s failure to release compliance documents, specifically Notice[s] of Violation, for Calpine facilities prior to the re-issuance of the November 9, 2004, Title V Permit, violated Title VI.”<sup>30</sup> Specifically, the complaint stated that BAAQMD’s policy or practice of failing to

---

<sup>25</sup> [http://www.network-democracy.org/cgi-bin/epa-pip/show\\_msg?seq=00114](http://www.network-democracy.org/cgi-bin/epa-pip/show_msg?seq=00114)

<sup>26</sup> US Environmental Protection Agency, Order Denying in Part and Granting in Part Petition for Objection to Permit. (May 24, 2004)

<sup>27</sup> *Id* at pg. 3.

<sup>28</sup> *See* fn. 3 at pg. 2.

<sup>29</sup> Californians for Renewable Energy (CARE), OCR Administrative Complaint No. 13R-04-R9 at pg. 11. (December 23, 2004)

<sup>30</sup> *See* fn. 28 at pg. 2.

provide information about NOV's for the facility caused a disparate impact on the minority residents of Pittsburg, CA by denying them access to critical compliance documents. The complaint further stated that the NOV's were "clear evidence of the Facility's continuous, unrelenting violations of its CO, NO<sub>x</sub>, ammonia, and VOC emission restrictions."<sup>31</sup> Lastly, the complaint stated that the complainants were "unaware of this substantial evidence of Calpine's extremely large number of violations" and that the "omitted evidence and information has a direct, substantial effect on the health and safety of the public in or within breathing distance of the Calpine facility."<sup>32</sup>

## **B. Recipients Response to Allegations**

BAAQMD submitted its response to OCR's January 3, 2008 Request for Information on March 14, 2008.<sup>33</sup> BAAQMD asserts that CARE's "claims are misplaced."<sup>34</sup> With regard to the first allegation, BAAQMD asserts that CARE has no legal right to comment on civil penalty settlement agreements entered into by the District under the California Health & Safety Code.<sup>35</sup> BAAQMD further stated that it has "never made it a practice of providing a comment period for such settlements, as it would do little to improve the quality of the settlements, and would only serve to delay the final resolution of the underlying violations and the collection by the District of civil penalties for them."<sup>36</sup>

BAAQMD disputes CARE's assertion that BAAQMD has allowed "other groups or group members, specifically Communities for a Better Environment, to review or comment on draft civil penalty settlement agreements in the past."<sup>37</sup> BAAQMD asserts that it is "not aware that it has ever provided an opportunity to comment on a civil penalty settlement agreement...and it is not the District's current practice to provide an opportunity for public comment on civil penalty settlements, [when not] required under California law, and the District is not aware of any instances in the past where it has provided such an opportunity."<sup>38</sup>

---

<sup>31</sup> See fn. 29.

<sup>32</sup> *Id.*

<sup>33</sup> Letter from Alexander Crockett, Esq., Assistant Counsel, Bay Area Air Quality Management District to Yasmin Yorker, Assistant Director, Office of Civil Rights, US EPA regarding 13R-04-R9. (March 14, 2008)

<sup>34</sup> *Id.* at pg. 1.

<sup>35</sup> *Id.* at pg. 2. See also, Cal. Health & Safety Code §§ 42402 and 42403.

<sup>36</sup> *Id.*

<sup>37</sup> See fn. 33.

<sup>38</sup> Email response from Mr. Alexander Crockett, Assistant Counsel, BAAQMD to Helena Wooden-Aguilar, Senior Case Manager, OCR, EPA regarding the 2<sup>nd</sup> Request for Information. (March 31, 2009)

With regard to the second allegation, BAAQMD asserts that investigatory records “are not public information because they are sensitive enforcement-confidential materials that the District needs to keep confidential while enforcement action is under way in order to protect the integrity of the enforcement process.”<sup>39</sup> BAAQMD further states that investigatory records “are exempt from disclosure under the California Public Records Act, and for that reason the District does not release them to the public while enforcement action is going on, either during pre-filing settlement negotiations or after litigation is filed.”<sup>40</sup> BAAQMD states that enforcement and investigative documents are available for public review when the enforcement matter is resolved, and “when the violator satisfies its obligation to pay its penalty.”<sup>41</sup> Here, Calpine’s “obligation was satisfied when Calpine’s check was deposited and cleared on October 6, 2004.”<sup>42</sup> Enforcement and investigative documents associated with the civil penalty settlement agreement between BAAQMD and Calpine would not have been available for public review prior to that date.

BAAQMD maintains that CARE was provided “access to all of the investigatory files for all of the violations at issue, as well as the final settlement agreement” once Calpine’s obligation was fulfilled.<sup>43</sup> The investigatory records include information about “the facility where the violation occurred, the particular source within the facility that was involved, the date and time the violation occurred, the regulation that was violated, and a brief description of what happened.”<sup>44</sup>

### **C. Additional Investigative Information**

In response to an EPA Order dated May 24, 2004, regarding the Los Medanos Permit, BAAQMD, on August 12, 2004, reopened its permit and solicited comments to be submitted by September 20, 2004.<sup>45</sup> The District received two sets of comments from CARE President, Mr. Michael Boyd, and from Mr. Robert Sarvey. BAAQMD responded to all comments on November 9, 2004.

---

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Email from Alexander Crockett, Assistant Attorney, BAAQMD to Helena Wooden-Aguilar, Senior Case Manager, OCR, EPA regarding 13R-04-R9. (April 28, 2009)

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at pg. 3.

<sup>45</sup> *Id.*

Additionally, on January 7, 2003, a settlement agreement -- distinct from the September 1, 2004, civil penalty settlement agreement discussed above -- was signed and executed in the case: *Communities for a Better Environment, et. al. v. U.S. EPA*, No. 02-70191 (9<sup>th</sup> Circuit). Neither CARE nor BAAQMD were a party to this settlement agreement. Rather, this settlement agreement involved a petition filed by Communities for a Better Environment (CBE) and Our Children's Earth Foundation alleging "deficiencies in the BAAQMD's program related to the exemption for portable equipment and the definition of 'administrative permit amendment.'"<sup>46</sup> On January 14, 2003, this settlement agreement was placed in the Federal Register for public comment as required under section 113(g) of the Clean Air Act.

## V. FINDINGS OF MATERIAL FACT

### Allegation One:

**BAAQMD's failure to provide public participation opportunities on a settlement agreement, which resolved 66 notices of violation against Calpine facilities, violated Title VI.**

After reviewing the administrative record, OCR established the following findings of material fact for allegation one:

1. The Los Medanos Energy Center facility is a natural gas-fired power plant presently owned and operated by Calpine.<sup>47</sup>
2. BAAQMD is vested with air pollution control program enforcement authority by California Health and Safety Code §§ 40001, 40701, 40752, 42400 to 42409, 42420, 42421 and 42451 to 42454.<sup>48</sup> None of these sections afford the public with an opportunity to comment on civil penalty settlement agreements.<sup>49</sup>
3. California Health and Safety Code § 42403 authorizes BAAQMD to file civil actions to assess and recover penalties.<sup>50</sup>

---

<sup>46</sup> <http://www.epa.gov/fedrgstr/EPA-AIR/2003/January/Day-14/a738.htm>

<sup>47</sup> See fn. 27, at pg. 3.

<sup>48</sup> California Health and Safety Code §§ 40001 – 42454.60.

<sup>49</sup> *Id.*, See also fn. 35.

<sup>50</sup> California Health and Safety Code § 42403.



4. BAAQMD's policy is that enforcement/investigative documents are available for public review only after (1) the enforcement matter is resolved, and (2) the violator satisfies its obligation to pay its penalty.<sup>51</sup>
5. BAAQMD, as a matter of policy, does not provide a public notice and comment period before its civil penalty settlements become final.<sup>52</sup>
6. BAAQMD's policy is that non-parties may not participate in settlement negotiations.<sup>53</sup>
7. With regard to the Calpine settlement agreement that is the subject of this complaint, BAAQMD followed its policy of not allowing non-parties to participate in the settlement negotiations. Specifically, CARE – a non-party – did not participate in the settlement negotiations.<sup>54</sup>
8. On September 1, 2004, the civil penalty settlement agreement between BAAQMD and Calpine was executed.<sup>55</sup>
9. On October 6, 2004, Calpine's obligation to pay its penalty under the settlement agreement was satisfied when its check was deposited and cleared.<sup>56</sup>
10. On November 9, 2004, BAAQMD's response to comments for the Title V Los Medanos Permit stated that "the District has recently entered into a Settlement Agreement to finally resolve all of the outstanding Notices of Violations associated with the facility. Calpine has agreed to pay a monetary penalty and to fund certain Supplemental Environmental Projects in connection with violations at the Los Medanos Energy Center and two other facilities."<sup>57</sup>

---

<sup>51</sup> See fn. 41.

<sup>52</sup> *Id.* at pg. 4.

<sup>53</sup> See fn. 40.

<sup>54</sup> *Id.*

<sup>55</sup> See fn. 29.

<sup>56</sup> See fn. 42.

<sup>57</sup> *Id.* at pg. 2.

11. On November 9, 2004, CARE became aware of the settlement agreement to resolve the NOV's associated with the Calpine facility. By that time, the settlement agreement had already been executed.<sup>58</sup>
12. EPA's Office of Enforcement and Compliance issued a memorandum dated October 28, 2003, regarding restrictions on communicating with parties outside parties regarding enforcement actions. This memorandum was in place during the time period of the events in this complaint.<sup>59</sup>
13. EPA's memorandum states that "central to [EPA]'s enforcement work is the need to keep information that is not already in the public domain confidential while EPA is engaged in an enforcement matter. Although oftentimes the existence of an enforcement action is widely known, specific and sensitive enforcement information should be closely guarded. Therefore, communication with outside parties about enforcement-sensitive information should not occur."<sup>60</sup>
14. EPA's memorandum specifically notes that "Information that should not be shared with external parties includes: Information on the status of an investigation, negotiation, litigation, or settlement discussion, including strategy and tactics."<sup>61</sup>
15. EPA's memorandum also states that "[w]hile there are many details within enforcement matters that are confidential and may not be shared with outside parties, public documents that can be shared with outside parties may include: Information requests to initiate investigations; Judicial opinions; Notices of violations; Administrative orders; Final settlement agreements; Motions and other documents filed with courts or filed in administrative proceedings; and Court decisions."<sup>62</sup>
16. Finally, EPA's memorandum states that "[i]t is common practice that once settlement negotiations begin in any given enforcement matter, that the parties agree, either verbally or in writing, that such communications will be held confidential between the parties.... In particular, discussions on the

---

<sup>58</sup> Email from Mr. Robert Sarvey, CARE to Helena Wooden-Aguilar, Acting Assistant Director, Office of Civil Rights, US EPA regarding a response to OCR's Request for Information. (February 10, 2010)

<sup>59</sup> U.S. Environmental Protection Agency Memorandum regarding "Restrictions on Communicating With Outside Parties Regarding Enforcement Actions" (October 28, 2003).

<sup>60</sup> EPA Memorandum, October 28, 2003 at pg. 2.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at pg. 2.

remedy being sought in settlement should be confined to the settlement room where only EPA and other government personnel involved in the enforcement matter and the opposing party is present. Discussion with outside parties relating to the remedy necessary to settle a given case is inappropriate.”<sup>63</sup>

17. On January 7, 2003, a settlement agreement was signed and executed in the case: *Communities for a Better Environment, et al. v. U.S. EPA*, No. 02-70191 (9<sup>th</sup> Circuit). On January 14, 2003, this settlement agreement was placed in the Federal Register for public comment in accordance with section 113(g) of the Clean Air Act.<sup>64</sup>
18. Ms. Adrienne Bloch, Senior Attorney, CBE stated that “to the best of my knowledge, CBE has never had the opportunity to view a BAAQMD draft settlement to which CBE was not a party.”<sup>65</sup>

#### **Allegation Two:**

#### **BAAQMD’s failure to release compliance documents, specifically, Notices of Violation, for Calpine facilities prior to the re-issuance of the November 9, 2004 Title V permit, violated Title VI.**

After reviewing the administrative record, OCR established the following findings of material fact for allegation two:

19. On September 6, 2001, BAAQMD issued a Major Facility Review Permit for Calpine’s Los Medanos Energy Center, Pittsburg, CA.<sup>66</sup>
20. At some point in 2003, CARE requested information from BAAQMD regarding Notices of Violation at the Calpine facility.<sup>67</sup>

---

<sup>63</sup> *Id.* at pg. 3.

<sup>64</sup> See fn. 46.

<sup>65</sup> Letter from Adrienne Bloch, Senior Attorney, Communities for a Better Environment to Helena Wooden-Aguilar, Senior Case Manager, OCR, EPA regarding administrative complaint no. 13R-04-R9. (April 1, 2009)

<sup>66</sup> BAAQMD, Final Major Facility Review Permit, Issued to Los Medanos Energy Center, LLC Facility #B1866 at pg. 3. (November 9, 2004)

<sup>67</sup> OCR requested copies of Public Records Request #03-07-49 and #03-07-50 from BAAQMD and CARE. These documents are regarding the Notices of Violations that were requested through the California Public Records Laws by CARE for Calpine facilities located in Pittsburg, California. However, neither BAAQMD nor CARE could locate and provide a copy of the documents.

21. On July 9, 2003, BAAQMD provided CARE with a NOV listing of basic information for the Calpine facility. The basic information included the facility name, the NOV number, the date of the NOV, the regulation violated, comments from the BAAQMD investigator, and the status of the NOV.<sup>68</sup>
22. On July 17, 2003, and September 4, 2003, BAAQMD sent letters to Mr. Robert Sarvey of CARE, stating that the “Notices of Violations are still under investigation by the District. Pursuant to the State of California Government Code, Section 6254, Subdivision (f), records of complaints to or investigations by a local governmental agency for law enforcement purposes are exempt from the Public Records Act disclosure requirement.”<sup>69</sup> BAAQMD also stated that “once the District enforcement action is completed, the associated public record will be forwarded to you at the earliest possible opportunity.”<sup>70</sup>
23. On August 12, 2004, BAAQMD published a public notice regarding the reopening of the Title V Los Medanos Permit and requested public comments by September 20, 2004.<sup>71</sup>
24. On September 20, 2004, Mr. Robert Sarvey, CARE, submitted comments electronically to BAAQMD about the Los Medanos Title V permit.<sup>72</sup>
25. On September 20, 2004, Michael Boyd, CARE, electronically filed comments to BAAQMD about the Los Medanos Title V permit.<sup>73</sup>

---

<sup>68</sup> Email from Sandy Crockett, Assistant Attorney, BAAQMD to Helena Wooden-Aguilar, Assistant Director, OCR, EPA regarding 13R-04-R9 (Attachment “Sarvey July 10, 2003, Comments re Calpine NOV’s” and “Boyd CARE July 10, 2003 Comments re Calpine NOV’s). (April 15, 2011) *Note:* On September 12, 2011, OCR sent CARE an email confirming that it had received this information from BAAQMD. OCR also asked why the basic information provided by BAAQMD was considered insufficient and/or not meaningful. CARE did not provide a response.

<sup>69</sup> Letter from Rochelle Henderson, Public Records Coordinator, BAAQMD to Robert Sarvey, CARE regarding Public Records Act Requests #03-0-7-49 & 50 (Pending NOV’s for Delta Center and Los Medanos). (September 4, 2003)

<sup>70</sup> *Id.*

<sup>71</sup> Letter from Jack P. Broadbent, Executive Officer, APCO to Ms. Deborah Jordon, Director, Air Management Division, US EPA regarding the reopening of a Major Facility Review Permit for facility no. B1866. (November 9, 2004)

<sup>72</sup> Response to Comments submitted via email from Robert Sarvey for the Final Major Facility Review Permit, Issued to Los Medanos Energy Center, LLC Facility #B1866. (November 9, 2004)

<sup>73</sup> Comments from Michael Boyd, CARE to Brenda Cabral, BAAQMD regarding Title V permit. (September 20, 2004)

26. On November 9, 2004, BAAQMD provided its Response to Comments regarding the reopening of a Title V permit for the Los Medanos Energy Center.<sup>74</sup>
27. The Response to Comments stated that “the District has recently entered into a Settlement Agreement to finally resolve all of the outstanding Notices of Violation associated with the facility. Calpine has agreed to pay a monetary penalty and to fund certain Supplemental Environmental Projects in connection with violations at the Los Medanos Energy Center and two other facilities.”<sup>75</sup> BAAQMD stated that “now that the violations are finally resolved, the District is providing the documents the commenter [CARE] requested.”<sup>76</sup>
28. The Response to Comments also stated that on July 9, 2003, “the District informed [CARE] of all of the violations, the date on which each violation took place, the regulatory provision that was violated in each case, and a brief summary description of each incident.”<sup>77</sup>
29. By letter dated November 19, 2004, BAAQMD provided compliance information, copies of the requested Notices of Violation, and a copy of the civil penalty settlement agreement to CARE.<sup>78</sup>
30. The withholding of enforcement information until NOVs and associated penalties are finalized was a general practice and was typically how EPA handled such matters at the time of the events cited in the complaint.<sup>79</sup>

## **VI. LEGAL FRAMEWORK FOR ANALYZING DISPARATE IMPACT COMPLAINT**

### **A. Title VI and EPA’s Regulations Implementing Title VI**

Title VI prohibits discrimination based on race, color, or national origin under programs or activities receiving Federal financial assistance. Specifically, Section 601 of Title VI provides:

---

<sup>74</sup> See fn. 45.

<sup>75</sup> *Id.* at pg. 2.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> See fn. 17 at pg. 3. *Note:* BAAQMD claimed that they provided the compliance information (a list of the NOV’s not the specific documents with all the information) to CARE around the end of October 2004 or early November 2004. However, BAAQMD did not provide specific evidence to support that fact.

<sup>79</sup> See fn. 63.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.<sup>80</sup>

The purpose of Title VI is to ensure that public funds are not spent in a way that encourages, subsidizes, or results in discrimination on the basis of race, color, or national origin. Toward that end Title VI bars intentional discrimination.<sup>81</sup>

In addition, Section 602 of Title VI authorizes and directs Federal agencies to enact “rules, regulations, or orders of general applicability” to effectuate the provisions of Section 601.<sup>82</sup> Like most federal agencies, in addition to prohibiting intentional discrimination, EPA’s regulations prohibit recipients of Federal funds from using criteria or methods of administering their programs that have the effect of subjecting individuals to discrimination based on race, color, or national origin. The Supreme Court has recognized that such regulations may validly prohibit practices having a disparate impact on protected groups, even if the actions or practices are not intentionally discriminatory.<sup>83</sup>

EPA’s regulations implementing Title VI, codified at 40 C.F.R. Part 7, were promulgated under the authority of Section 602. Under these regulations, OCR is responsible for investigating complaints alleging intentional discrimination and/or disparate impact discrimination in programs or activities of recipients receiving financial assistance from EPA.<sup>84</sup> Under 40 C.F.R. § 7.120(g), if OCR’s investigation reveals no violation of EPA’s Title VI regulations, OCR will dismiss the complaint.

## **B. Standard for Evaluating a Disparate Impact Claim**

Pursuant to EPA’s regulation at 40 C.F.R. §7.35(b):

A recipient [of EPA assistance] shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing the accomplishment of the objectives of the program with respect to individuals of a particular race, color, [or] national origin [ . . . ].

In assessing whether a recipient’s criteria or methods of administration resulted in

---

<sup>80</sup> 42 U.S.C.S. § 2000d.

<sup>81</sup> *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 607-08 (1983).

<sup>82</sup> 42 U.S.C.S. §2000d-1.

<sup>83</sup> See *Alexander*, 469 U.S. at 292-94; *Guardians*, 463 U.S. at 582; *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406, *reh’g denied*, 7 F.3d 242 (11<sup>th</sup> Cir. 1993).

<sup>84</sup> 40 C.F.R. § 7.20.

unlawful discriminatory effects, the Agency relies, in part, on case law developed under Title VI and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* This case law sets forth the legal standard for establishing an adverse disparate impact.

#### 1. Elements of a *Prima Facie* Disparate Impact Claim

To determine whether a *prima facie* case of disparate impact exists, OCR must ascertain whether the recipient utilized a facially neutral practice or engaged in a facially neutral action that may have an adverse and disproportionate impact on a group protected by Title VI.<sup>85</sup> In addition, OCR will determine whether a causal connection exists between the recipient's policy, practice, or action and the allegedly adverse disparate impact.<sup>86</sup> If the Agency finds that a causal connection exists, it will then determine whether the complainant protected group has been disproportionately impacted by the recipient's action or inaction.<sup>87</sup> If the evidence does not establish all of these *prima facie* elements, then the Agency will dismiss the complaint.<sup>88</sup>

#### 2. Justification and Less Discriminatory Alternatives

If a *prima facie* adverse disparate impact case exists, the Agency will determine if the recipient can provide a "substantial legitimate justification" for its action that caused the adverse disparate impact.<sup>89</sup> If the recipient cannot provide a justification, then the Agency will find that the recipient violated EPA's Part 7 regulations. If the recipient can provide a justification, then the Agency will determine if there was a "less discriminatory alternative" for the recipient's action.<sup>90</sup> If a less discriminatory alternative did exist, then the Agency will find that the recipient violated EPA's Part 7 regulations. If no less discriminatory alternative existed, then the Agency will make a finding of no violation and dismiss the complaint.

---

<sup>85</sup> *New York City Env'tl. Justice Alliance (NYCEJA) v. Giuliani*, 214 F.3d 65, 69 (2d Cir. 2000); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11<sup>th</sup> Cir. 1993); *Larry P. v. Riles*, 793 F.2d 969, 982 (9<sup>th</sup> Cir. 1984).

<sup>86</sup> *NYCEJA*, 214 F.3d at 69.

<sup>87</sup> *NAACP v. Medical Center, Inc.*, 657 F.2d 1322, 1332 (3d Cir. 1981); *cf. Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 656-57 (1989) (Title VII case); *see Bryan v. Koch*, 627 F.2d 612, 617 (2d Cir. 1980).

<sup>88</sup> 40 C.F.R. § 7.120(g).

<sup>89</sup> *See Elston*, 997 F.2d at 1413; *Georgia State Conferences of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417-18 (11<sup>th</sup> Cir. 1985).

<sup>90</sup> *See Elston*, 997 F.2d at 1407.

### 3. Evidentiary Burden of Proof

The preponderance-of-the-evidence standard is the applicable burden of proof in this investigation and decision.<sup>91</sup> In other words, to make a finding of adverse disparate impact, the Agency must be satisfied at every step of the analysis that the record demonstrates that it was more likely than not that the recipient's actions had a disproportionately adverse effect on the complainant.

## VII. ANALYSIS

1. BAAQMD's failure to provide public participation opportunities on a settlement agreement, which resolved 66 notices of violation against Calpine Pittsburg Power Plant facilities, violated Title VI.

With regard to the first allegation, the record is undisputed that BAAQMD did not allow public participation with regard to its settlement agreement with Calpine. BAAQMD's stated justification is that, under California law, the public has no legal right to review or provide comments to civil penalty settlement agreements entered into under the California Health and Safety Code §§40001 to 42454 (Code).<sup>92</sup> Specifically, §42403 of the Code authorizes BAAQMD broad enforcement authority to file civil actions to assess and recover penalties.<sup>93</sup> This enforcement authority includes negotiating and entering into civil penalty settlement agreements with alleged violators of environmental laws.<sup>94</sup>

The record reveals that BAAQMD "has never made a practice of providing a comment period for such settlements."<sup>95</sup> BAAQMD stated that it "provides access to all publicly available information pursuant to the California Public Records Act,"<sup>96</sup> and makes investigatory records "available to any interested person once the violations have been finally resolved."<sup>97</sup> Section 42403 of the Code does not provide the public the opportunity to review and comment on civil penalty settlement agreements.

---

<sup>91</sup> U.S. Dep't of Justice, *Investigation Procedures Manual for the Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes* at pg. 58 (1998) (citing Administrative Procedure Act, 5 U.S.C. § 556(d)).

<sup>92</sup> See fn. 49.

<sup>93</sup> See fn. 50.

<sup>94</sup> *Id.*

<sup>95</sup> See fn. 54, at pg. 2.

<sup>96</sup> *Id.* at pg. 5.

<sup>97</sup> *Id.*



BAAQMD's policy was consistent with EPA's policy at the time regarding public participation in enforcement matters. Specifically, EPA's policy was "to keep [enforcement] information that is not already in the public domain confidential while EPA is engaged in an enforcement matter. Although often times the existence of an enforcement action is widely known, specific and sensitive enforcement information should be closely guarded. Therefore, communication with external parties about enforcement sensitive information should not occur."<sup>98</sup>

OCR finds that BAAQMD's refusal to provide information about a settlement agreement and its negotiations was consistent with both California law and EPA policy at the time. OCR, therefore, finds that, even assuming for the sake of argument that a *prima facie* case of adverse disparate impact has been established, BAAQMD had a substantial, legitimate justification for its actions, for which there was no less discriminatory alternative. Thus, OCR finds that BAAQMD did not violate Title VI when it did not allow CARE to participate in the settlement negotiations for the Calpine facility.

As evidence of discrimination, CARE alleged that BAAQMD allowed another organization – Communities for a Better Environment (CBE) – to comment on a settlement agreement to which it was not a party.<sup>99</sup> OCR's investigation, however, revealed that CBE was in fact a party to the settlement agreement.<sup>100</sup>

The record shows that a settlement agreement was executed on January 7, 2003. This was a settlement agreement pursuant to section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1) and involved a petition filed by CBE and Our Children's Earth Foundation that intended to resolve regulatory deficiencies alleged against BAAQMD.<sup>101</sup> Unlike the Calpine settlement agreement, it was not a civil penalty settlement agreement pursuant to the California Health and Safety Code § 42403. Further, the Clean Air Act provision provides that subsequent to executing the agreement, the "Regional Administrator shall forward a notice to the Federal Register requesting public comments on this Settlement Agreement."<sup>102</sup>

The statement by CARE that CBE reviewed and commented on the January 7, 2003 settlement agreement was accurate, however, this opportunity was afforded to CBE because CBE was a party to the settlement agreement, and because the Clean Air Act mandates that such settlement agreements be subject to public comment. Thus, the CBE settlement is not an appropriate comparator and the fact that CBE could participate in this

---

<sup>98</sup> See fn. 79.

<sup>99</sup> See fn. 29.

<sup>100</sup> See fn. 46.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

settlement agreement does not suggest a discriminatory motive in declining to allow CARE to participate in a settlement under vastly distinct circumstances.

2. BAAQMD's failure to release compliance documents, specifically Notice of Violations, for Calpine facilities prior to the re-issuance of the November 9, 2004, Title V Permit, violated Title VI.

With regard to the second allegation, the record reveals that BAAQMD provided CARE with a NOV listing of basic information for the Calpine facility on July 9, 2003. The basic information included the facility name, the NOV number, the date of the NOV, the regulation violated, comments from the BAAQMD investigator, and the status of the NOV.<sup>103</sup> The record is undisputed that BAAQMD did not provide CARE with copies of the complete Calpine Notices of Violation until November 19, 2004, which was after BAAQMD and Calpine had resolved and settled the alleged violations.<sup>104</sup> CARE requested copies of these NOVs sometime in 2003.

On July 17, 2003, and September 4, 2003, BAAQMD responded to CARE's requests by stating that the "Notices of Violations are still under investigation by the District. Pursuant to the State of California Government Code, Section 6254, Subdivision (f), records of complaints to or investigations by a local governmental agency for law enforcement purposes are exempt from the Public Records Act disclosure requirement."<sup>105</sup> Once the NOVs were resolved through the settlement agreement, BAAQMD provided CARE with copies of the NOVs.<sup>106</sup>

EPA's policy that was in place at the time of these events, notes that "while there are many details within enforcement matters that are confidential and may not be shared with outside parties, public documents that can be shared with outside parties may include NOVs."<sup>107</sup> The investigation revealed that BAAQMD provided CARE with a listing of NOVs with basic information for the Calpine facilities but did not release the complete NOV record because it was enforcement sensitive.<sup>108</sup> CARE claims that this

---

<sup>103</sup> See fn. 68.

<sup>104</sup> According to the record, CARE requested copies of the NOVs from BAAQMD. On July 9, 2003, BAAQMD provided CARE with a listing of the NOVs. CARE filed its Title VI complaint with OCR in December 2004. OCR recognizes that CARE's second allegation may have been filed in an untimely manner. See 40 C.F.R. §7.120(b)(2). Because OCR discovered this issue when the investigation was nearly complete and finds that there is no violation of Title VI, the potential untimeliness issue will not be discussed.

<sup>105</sup> See fn. 70.

<sup>106</sup> See fn. 78.

<sup>107</sup> See fn. 62.

<sup>108</sup> See fn. 103.

listing was not adequate and the failure to release the information was a violation of Title VI. CARE did not explain why the basic information BAAQMD provided was not adequate.

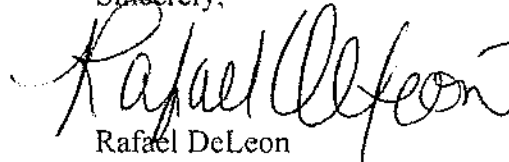
BAAQMD's policy of not disclosing NOV's which are under investigation and identified as enforcement sensitive was consistent with EPA's policy at the time. OCR finds that, even assuming for the sake of argument that a *prima facie* case of adverse disparate impact has been established, BAAQMD had a substantial, legitimate justification for its actions, for which there is no less discriminatory alternative. Further, OCR finds that BAAQMD's refusal to provide copies of the complete NOV record prior to the conclusion of its investigation was consistent with California law and EPA policy at the time. OCR finds no violation of Title VI with regard to this allegation.

## VIII. CONCLUSION

Based upon a review of the materials submitted and information gathered during its investigation, as well as controlling legal authority, OCR has not found a violation of Title VI or EPA's implementing regulations.

If you have any questions, please contact Helena Wooden-Aguilar, Assistant Director, Office of Civil Rights by telephone at 202-564-0792, by email at [wooden-aguilar.helena@epa.gov](mailto:wooden-aguilar.helena@epa.gov) or by mail at U.S. EPA, 1200 Pennsylvania Ave., NW, Mail Code 1201A, Washington, D.C., 20460-0001.

Sincerely,

  
Rafael DeLeon  
Director

cc: Martin Homec  
Law Office of Martin Homec  
P. O. Box 4471  
Davis, CA 95617-4471

Michael Boyd, President  
CALifornians Against Renewable Energy  
5439 Soquel Drive  
Soquel, CA 95073-2659

Jo Ann Asami, Title VI Contact  
EPA Region 9

Stephen G. Pressman, Associate General Counsel  
Civil Rights & Financial Law Office (MC 2399A)